BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **CALSTRIP STEEL CORPORATION** 7140 Bandini Boulevard City of Commerce, CA 90040 **Employer**	Inspection No. **312668825** Formerly Docket Nos. 12-R3D6-1998 and 1999 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petitions for reconsideration filed by the Division of Occupational Safety and Health (Division) and Calstrip Steel Corporation (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on December 8, 2011, the Division conducted an accident inspection at a place of employment in City of Commerce, California maintained by Calstrip Steel Corporation (Employer). On June 8, 2012, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.[1]

Citation 1 alleges a serious, accident related violation of section 3638, subsection (d) [failure to train employees in use of an extensible boom platform prior to operation]. Citation 2 alleges a serious, accident related violation of section 3657, subsection (h) [failure to lockout tagout a bridge crane while a boom platform was in the path of a bridge crane].

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. The Division submitted a written closing argument on October 17, 2014, requesting that Citation 2's classification be amended to willful. The ALJ issued a Decision on October 30, 2015. The Decision granted the Division's request to amend Citation 2 to willful, and denied Employer's appeal, finding a serious, accident-related violation

[1] Unless otherwise specified, all references are to California Code of Regulations, Title 8.

in Citation 1, and a serious, accident-related violation in citation 2. The Decision did not find Citation 2 to be willful. Penalties of $28,800 were assessed.

The Division timely filed a petition for reconsideration of the ALJ's Decision. Employer also timely filed an answer to the Division's petition, as well as a separate petition for reconsideration.

ISSUE

1. Did the Division demonstrate a violation of section 3638, subsection (d) by a preponderance of the evidence?
2. Did the Division establish a serious and accident-related violation of Citation 1?
3. Did the Division demonstrate a violation of section 3657, subsection (h) by a preponderance of the evidence?
4. Was the ALJ in error to allow an amendment of the classification of Citation 2?
5. Did the Division establish a willful, serious, and accident-related violation of Citation 2?

FINDINGS OF FACT

1. On December 8, 2011, Employer's employee, Hector Cervantes (Cervantes), was operating an extensible boom platform (or manlift) in Employer's Omega Steel building. Cervantes was joined by his supervisor, David Thrasher (Thrasher) in the manlift that afternoon. They were installing bird deterrent products in the rafters.

2. Employer did not instruct its workers in the proper use of an extensible boom platform (Genie S-40) prior to operating the equipment.

3. Supervisory personnel of Employer, including Mario Vargas (Vargas), Paul Garcia (Garcia), and Jeff Jaeger, had knowledge of the presence of the lift in the Omega Steel building.

4. The manlift was operating in the path of the bridge crane.

5. Vargas and Garcia were aware that employees were operating the manlift while the north bridge crane was in operation in the building. No supervisor directed the crane operator, Roberto Luna (Luna), to lock out the crane. Nor did either Vargas or Garcia direct the manlift to lower out of the path of the crane.

6. Due to the failure to lock out the bridge crane, a collision occurred between the manlift and the bridge crane. The collision killed one employee located in the manlift, and seriously injured the other employee.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

(a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
(b) That the order or decision was procured by fraud.
(c) That the evidence does not justify the findings of fact.
(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
(e) That the findings of fact do not support the order or decision.

The Division petition for reconsideration is filed on the basis of Labor Code section 6617 subdivision (e). Employer's petition for reconsideration rests on section 6617, subdivisions (a), (c), and (e).

Did the Division demonstrate a violation of section 3638, subsection (d) by a preponderance of the evidence?

Citation 1 alleges a violation of section 3638, subsection (d), Equipment Instructions and Marking. Section 3638, subsection (d) states:

> (d) Employees shall be instructed in the proper use of the platform in accordance with this Article, the manufacturer's operating instructions and Section 3203, Injury and Illness Prevention Program.

The Division's citation also references the Illness and Injury Prevention (IIPP) Program safety order, section 3203, subsection (a)(7). The alleged violative description reads at length:

> On December 8, 2011 the employer did not instruct two workers in the proper use of an extensible boom platform (Genie S-40) prior to operating the equipment. The employer did not have records of training the two workers in the equipment's safe operation. The two operators did not receive instruction in the equipment's operation from the rental company (Sunbelt Rentals Inc.). The operator's manual (part # 133026) supplied with the equipment requires operators to be trained prior to its use and warns against operating the equipment in the path of energized bridge cranes. One of the operators did not know of the existence and location of the operator's manual and denies ever being trained in the equipment's operation. Two workers elevated on the extensible boom platform were seriously injured (a fatality and a 24-hour hospitalization) when a moving bridge crane collided with the boom arm of the extensible boom platform.

The safety order requires employees be instructed in the proper use of the platform lift equipment, and that the instruction be in accordance with the relevant safety orders, the manufacturer's manual, and the IIPP safety order. While the term "instruct" is not defined in the safety order, it is generally used synonymously with "teach" or "train".[2] The Board has held that training, "when used to describe the process of providing employees with that knowledge and ability in this context, is to instruct so as to make proficient or qualified." (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).) Cervantes, one of the two employees who used the lift, testified that he learned how to operate platform lifts from coworkers, and had used an aerial device only 15 to 20 times in his 11 years as an employee at Calstrip. Employer cannot be said to have provided any instruction to Cervantes, based on this testimony. (*Hypower, Inc.*, Cal/OSHA App. 12-1498, Denial of Petition After Reconsideration (Sep. 11, 2013). [Employee with 'past experience' is not qualified to 'train' and himself had not been 'trained'. Language in 3203(a)(7) requires that employer "provide training and instruction".])

Pursuant to the IIPP safety order, employees must also be provided with the appropriate training when a new job assignment is given, new procedures or equipment is introduced in the workplace, or when the employer is made aware of a new or previously unrecognized hazard. (Section 3203, subsection (a)(7).) While Cervantes may have operated lifts in the past, there is no evidence to suggest he had any prior experience with an extensible boom of this kind, or in operating lift equipment near a bridge crane. As the Board found in *Hill Crane Service, Inc.*, Cal/OSHA App. 12-1275, Denial of Petition for Reconsideration (Dec. 23, 2013), Employer in this instance failed to meet its obligation to provide training on the hazards of this new work assignment.

We conclude that the required instruction did not occur here. Although Division Associate Safety Engineer Yancy Yap (Yap) requested all relevant training records, none related to use of aerial devices were provided by Employer. Cervantes testified that he had never reviewed the manual for the lift, and was not aware that such a document existed. No management witness rebutted the credible testimony of Cervantes or Yap on any of these points; no further training documents or training materials were provided at hearing for review.

Cervantes did not receive "instructions in proper use" of the Genie extensible boom lift as required by the safety order. A violation of the safety order is established.

Did the Division establish a serious and accident-related violation of Citation 1?

Labor Code section 6432, subsection (a) creates a rebuttable presumption that a "'serious violation' exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." Yap testified regarding the actual hazards created by the violation. Yap explained that the manlift could jerk or fall due to improper operation. He testified that improper operation also creates the hazard of electrocution, as employees risk running into an energized source, such as a power line. Yap also identified the hazard of employees falling from the basket, and the hazard of an employee placing the boom lift in the path of a bridge crane, contra to the operating instructions

[2] www.dictionary.com (last accessed 7/21/2016): to furnish with knowledge, especially by a systematic method; teach; train; educate.

of the manlift, due to failure to provide instructions in proper use. According to Yap, there is a realistic possibility of death or serious physical harm created by all of these hazards.

The Employer established that several of these hazards were not actual hazards created by the violation in this instance—Yap did not see any electrical hazards in the roof, so there was no actual hazard of electrocution, and as the employees were using fall protection, there was not an actual hazard of employees falling from the manlift. However, the Division established that one employee was killed (Thrasher) and another seriously injured due to the manlift being placed in the path of a crane, in violation of the manlift's operating instructions. A realistic possibility of a serious injury or death created by the violation is established.

To demonstrate a violation is accident-related, the Division must make a "showing [that] the violation more likely than not was a cause of the injury." *Duinick Bros*., Cal/OSHA App. 06-2870 Decision After Reconsideration & Order of Remand (Apr. 13, 2012), citing *Mascon, Inc*., Cal/OSHA App. 08-4270, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Nov. 1, 2002); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration [24] (Oct. 4, 2002).) The ALJ found the failure to properly train the employees in operation of the manlift in compliance with the Genie operating instructions established a nexus, showing the violation was more likely than not a cause of the accident. We are in agreement with her finding, and uphold both the serious and accident-related classification of Citation 1.

Did the Division demonstrate a violation of section 3657, subsection (h) by a preponderance of the evidence?

In Citation 2 the Division alleges a serious and accident-related violation of section 3657, subsection (h) Elevating Employees with Lift Trucks, which requires,

> All bridge cranes and other moving or motorized equipment which could overrun or otherwise injure the elevated worker shall be shut down or locked out.

The Division's alleged violative description reads as follows:

> On December 8, 2011 the employer did not shut down or lock out the north bridge crane in Building P. Workers were using an extensible boom platform (Genie S-40) to install bird deterrents at the roof level 35 feet above the ground within the path of a bridge crane (Demag DGTR 25-ton capacity). The extensible boom platform was used concurrently with the bridge crane on December 8, 2011 from 7:30 am to 4:35 pm. Two workers elevated on the extensible boom platform were seriously injured (a fatality and a 24-hour hospitalization) when the moving bridge crane collided with the boom arm of the extensible boom platform. The employer did not practice an existing safety policy requiring the bridge crane to be "locked out" whenever workers are elevated on a man lift. The

> two extensible boom platform operators (a maintenance supervisor and maintenance assistance) and the bridge crane operator (a team leader) were trained in this lockout safety policy but none of the three made efforts to de-energize the crane while the extensible boom platform was being used.

The facts of the accident are largely undisputed. Maintenance employees Cervantes and Thrasher were at work in the elevated manlift at the same time that Luna was operating the bridge crane. Employer failed to shut down or lock out the bridge crane, and the bridge crane did "overrun or otherwise injure" the elevated workers; Thrasher was killed, Cervantes was seriously injured. A prima facie violation of the safety order is established by the Division.

Employer argues in its petition for reconsideration that the Standards Board did not intend for section 3657, subsection (h) to have "a literal interpretation" and that such an interpretation is "vague, ambiguous, and has no plain meaning." (Petition, p. 16.) The Board, however, following well known rules of statutory construction, interprets safety orders promulgated by the Standards Board in a manner that will render the language valid and constitutional where possible. (*General Telephone Company of California*, Cal/OSHA App. 82-406, Decision After Reconsideration (Nov. 19, 1982), *Martin J. Solis dba Solis Farm Labor Contractor*, Cal/OSHA App. 08-3414, Decision After Reconsideration (Dec. 30, 2013).) The California Court of Appeal has further stated,

> In considering a vagueness challenge to an administrative regulation, we do not view the regulation in the abstract; rather we consider whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case." (*Teichert Construction v. California Occupational Safety & Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 890-891.)

Employer's responsibility was to shut down or lock out the bridge crane when employees were at work in an elevated lift in the bridge crane's path. There is no ambiguity in this safety regulation. Employer's argument is rejected and the ALJ's finding of a violation of the safety order is upheld.

Was the ALJ in error to allow an amendment of the classification of Citation 2?

In its written closing statement, the Division requested that Citation 2 be amended to conform to proof of a willful, as well as serious and accident-related citation. The parties were requested to brief issues related to the proposed amendment via an Order of the Board filed on January 9, 2017. Employer responded in an answer received by the Board on February 13, 2017, but failed to serve the Division, as noted in the Division's March 1, 2017 response.

The Division argues that management personnel, including Garcia and Vargas, were aware that the crane was in operation while the manlift was in the building, in the crane's path, according to testimony adduced at hearing. The Division also argues that Employer suffers no prejudice as it was aware of all the information that made the citation willful well before the hearing. The Division defends the lateness of its motion by claiming that it only became aware of relevant information at the time of hearing.

Employer counters by stating the amendment would prejudice the Employer, and cites section 371.2, pre-hearing amendments. Employer states "it goes without saying that the proposed amendment would clearly prejudice Appellant." (Opposition, 4.) Employer defends its prejudice argument by claiming that it did not offer any evidence at hearing regarding this newly-proposed allegation of willfulness and it is now prejudiced by the loss of time and faded memories of key witnesses.

The Employer requests sanctions for "the Division's conduct", including "intentional misrepresentations" of witness testimony. The ALJ does not address this request in the Decision. In a footnote in her Decision dated October 30, 2015, the ALJ writes, "ALJ Hill-Williams granted the Division's motion to amend Citation 2 to a 'willful, serious accident related' violation, filed on October 16, 2014." (Decision, p. 2.)

As the Board has discussed in a number of Decisions After Reconsideration, amendments to pleadings in the administrative hearing context are liberally allowed. (See, *Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration (Mar. 28, 2016), *L&S Construction, Inc.* Cal/OSHA App. 10-1821, Decision After Reconsideration (Oct. 7, 2016).) Pursuant to section 372.1, subsection (a)(1) of the Board's rules of practice and procedure, "[a] request for an amendment that does not cause prejudice to any party may be made by a party or the Appeals Board at any time."

Even if the Board were to alternately classify the Division's request as a post-submission amendment[3], governed not by section 371.2, but by section 386, the requirement to give notice and an opportunity to show prejudice would be the same. See section 386:

> (a) The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision.
>
> (b) Each party shall be given notice of the intended amendment and the opportunity to show that the party will be prejudiced thereby unless the case is continued to permit the introduction of additional evidence in the party's behalf. If such prejudice is shown, the proceeding shall be continued to permit the introduction of additional evidence.

When considering a request to amend, courts, and the Board, will examine bad faith of the parties, failure to cure deficiencies at prior allowances to amend, the futility of an amendment, and

[3] An amendment during the course of the hearing is governed by 371.2, subsection (a)(2)(B). The outcome would be the same under either section 371.2 or 386.
Section 372, subsection (a)(2)(B): In the case of a request brought less than 20 days before the hearing or during a hearing:
(i) The amended citation or appeal arises out of the same general set of facts as the original citation or appeal such that the amended citation or appeal relates back to the original citation or appeal; and
(ii) The party seeking the amendment shows good cause for the failure to bring such request at least 20 days before the hearing; and
(iii) Any prejudice created by granting such amendment can be remedied by a continuance or other order of the administrative law judge.

prejudice. (*Dole v. Arco Chemical Co.* (3rd. Cir. 1990) 921 F.2d 484, 488.)[4] As to a claim of prejudice, the showing must demonstrate that the party was "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the… amendments been timely." (*Dole v. Arco Chemical Co.* (3rd. Cir. 1990) 921 F.2d 484, 488, quoting *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing* (3d Cir. 1981) 663 F.2d 419, 426.) However, as the Board has previously stated, a motion to amend is at the discretion of the Board. Here, the Board does not find that the Division's rationale for leaving the amendment until the close of hearing is persuasive. As in *Sierra Forest Products*, Cal/OSHA App. 09-3979, Decision After Reconsideration (Apr. 8, 2016),

> [T]he Board is disinclined to allow such an amendment at this late point in the proceedings. (*Duchrow v. Forrest* (2013), 215 Cal.App.4th 1359, 1377 ["Courts must apply a policy of liberality in permitting amendments at any stage of the proceeding, including during trial, when no prejudice to the opposing party is shown. … 'However, " 'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.' " ' " (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345 [119 Cal.Rptr.3d 253], citation omitted; accord, *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746 [41 Cal.Rptr.3d 754].)

Given the length of delay and the lack of a compelling reason for said delay, we decline to grant the amendment. We also acknowledge that the ALJ erred in failing to issue an Order, or otherwise communicate to the parties that she would address the motion to amend in her final Decision, although the error was harmless, and created no prejudice to the parties. (See, *Kaiser Steel Corp.*, Cal/OSHA App. 80-154, Decision After Reconsideration (Dec. 20, 1984) [harmless error by ALJ in denying a motion, no prejudice to Employer].)

Did the Division establish a serious and accident-related violation of Citation 2?

In order to establish a rebuttable presumption that a serious violation exists, the Division must demonstrate a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. (*Orange County Sanitation District*, Cal/OSHA App. 13-0287, Decision After Reconsideration (May 29, 2015).) At hearing the parties stipulated that Cervantes incurred a serious injury on December 8, 2011, and stipulated to the death of maintenance employee Thrasher.[5] We uphold that stipulation, although the Employer appears to urge otherwise. "The Division's actual forbearance from questioning its investigator regarding her opinion as to the severity of assumed injuries resulting from the violation corroborates the intent of the parties established by the terms of the stipulation contained in the hearing record." (*C&M*

[4] While the Board has no mandate to follow federal OSHA precedent, it does find the cases and principles cited here to be instructive. (*Department of Corrections California Medical Facility*, Cal/OSHA App. 97-1861, Decision After Reconsideration (Oct. 29, 1999).)

[5] At one point, Employer objected to the Division's attempt to explore the nature of the injuries through testimony, saying, "we stipulated to serious injuries."

Fine Pack, Inc., Cal/OSHA App. 07-4149, Decision After Reconsideration (May 11, 2012), citing *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredics* (1998) 61 Cal.App.4th 672, 679.)

A serious physical harm has occurred, as stipulated by the parties. Yap testified that the actual hazard created by the violation of the safety order was the collision of the bridge crane with the elevated lift. The Division established a rebuttable presumption that a serious violation exists.

Labor Code section 6432, subsection (c) provides the employer the opportunity to rebut the presumption of a serious violation. An employer may demonstrate that although it had exercised reasonable diligence, it could not and did not know of the violation. (Labor Code section 6432, subsection (a).) Here, Employer argues that it did not and could not have known of the accident with the bridge crane and manlift.

Employer's argument, that it could not have reasonably expected Luna to operate the bridge crane in an area near the manlift, is weak in light of the record. Employer cannot easily repudiate the actions of its supervisor, Luna, the bridge crane operator. The knowledge of a supervisor is imputed to the employer. (*Levy Premium Foodservice, dba Levy Restaurants*, Cal/OSHA App. 12-2714, Decision After Reconsideration (Aug. 25, 2014).) At least one, and possibly two, high level management officials saw Cervantes operating the manlift in the warehouse.[6] Although supervisors saw the violation occurring, no supervisor directed Luna, Thrasher, or Cervantes to shut down and lock out the bridge crane.

While the day shift ended at 2:30 pm, a second shift began at 4:30 pm. At the time of the incident, management officials including Garcia were still on site, Luna was at work, and second shift personnel, including Cruz Maya (a slitter machine operator who heard the accident from the restroom) and the second shift supervisor, Jeff Jaeger, were present. Employer's argument, that it did not and could not have known that Luna was running the crane at the time the manlift was operating in the warehouse on the second shift, is weak. The record demonstrates that a number of management personnel were present at the site at the time of the accident, including regular second shift management. The ALJ's finding of a serious classification is well-supported.

To classify a violation as accident related, the Division must make a "showing [that] the violation more likely than not was a cause of the injury. (*Mascon, Inc*., Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2013); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration [24] (Oct. 4, 2002))." (*Duininck Bros., Inc*., Cal/OSHA App. 06-2870 Decision After Reconsideration & Order of Remand (Apr. 13, 2012).) The ALJ found that there was a nexus between the failure to lock out the bridge crane and the injury and death suffered by the two employees in the manlift. We agree that there is a causal nexus between this violation and the accident and resultant injuries that occurred, and uphold this classification.

[6] Cervantes testified that he saw Garcia and Vargas in the warehouse at least one time. On cross-examination, floor supervisor Vargas denied having been on the warehouse floor that day. However, inspector Yap testified that when he reported to the incident cite a little before 8pm, Vargas told Yap he had seen the manlift operating in the warehouse at various points from 8:30 to 4:30 that day, and stated he had spoken with Thrasher throughout the day, although he was not present at the time of the accident.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member

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